Keokuk, 34 Id. 253; *Jones* v. *Van Patten*, 3 Ind. 107; *Benton* v. *Fay*, 64 Ill. 417; *Parsons* v. *Sutton*, 66 N. Y. 92; *True* v. *International Tel. Co.*, 60 Me. 9; *Dobbins* v. *Duquid*, 65 Ill. 464, 467.

ADELBERT HAMILTON.

Chicago.

Supreme Court of Kansas.

HUMMER ET AL. *v.* LAMPHEAR.

An action can be maintained on a domestic judgment, although it is in full force and effect, and the time within which an execution can issue has not expired.

ERROR from Jackson County.

Hudson & Tufts, for plaintiff in error.

Martin & Orr, for defendants in error.

HORTON, C. J.—The facts in this case are as follows: On June 17th 1876, the Perpetual Building and Saving Association recovered in the District Court of Atchison county a judgment against John P. and Matilda W. Hummer for the sum of $331.08, bearing interest at nine per cent. per annum. June 6th 1881, an execution was issued upon this judgment. This was returned wholly unsatisfied as to the building and saving association. On September 13th 1882, the judgment was assigned and transferred to A. H. Lamphear, who is now the owner thereof. On September 28th 1882, an *alias* execution was issued upon the judgment, directed to the sheriff of Jackson county, Kansas, and this execution was also returned unsatisfied. On November 24th 1883, A. H. Lamphear brought his action in the District Court of Jackson county against John P. and Matilda W. Hummer, upon the judgment in favor of the building and saving association of June 17th 1876, and alleged in his petition that the judgment was in full force and effect; that John P. and Matilda W. Hummer had no personal property within the state of Kansas subject to execution, nor the legal title to any lands or real estate in said state subject to execution; that Matilda W. Hummer was the owner of an equitable interest in a quarter section of land lying in Jackson county, state of Kansas, the legal title to which was in the state of Kansas, to secure the sum of $676.30, with interest from June 17th 1882, at ten per cent. per annum; that upon payment of this amount and interest, the state was ready and willing to give a deed or patent

conveying the land and the legal title thereto. The prayer of the petition was that judgment should be rendered against J. P. and M. W. Hummer for the sum of $331.08, with interest at nine per cent. per annum, and costs of suit; that the sheriff of Jackson county be appointed a receiver to ascertain the interest of Matilda W. Hummer in the land described in the petition; that he take possession of the same and hold it, with the rents and profits arising therefrom, subject to the order of the court, and for other and further relief as the court might deem meet and proper. The defendants, John P. and Matilda W. Hummer, demurred to the petition upon the grounds: 1st, that the court had no jurisdiction of the persons of the defendants or of the subject of the action; 2d, that the petition did not state facts sufficient to constitute a cause of action against the defendants or either of them. The court overruled the demurrer, and rendered judgment against the defendants for $546.17, with interest and costs, adjudged the same to be a first and prior lien on whatever interest the defendants or either of them had in the real estate described in the petition, and decreed that if the defendants failed or refused to pay the judgment within a day named, an order of sale issue to sell the property to satisfy the same. To the rulings and judgment of the court the defendants excepted. It is their contention at this time that the petition does not state facts sufficient to constitute a cause of action, because, upon its face, it appears that the judgment sued on was, at the commencement of this suit, in full force and effect, and that execution might have issued thereon, and the equitable interest of Matilda W. Hummer in the real estate in Jackson county have been taken by execution: Code, sects. 419, 443; Comp. Laws 1879, c. 104, sect. 1, subd. 8. To support this, it is insisted that at common law an action could not be maintained upon a judgment until the time within which an execution might issue had elapsed: *Pitzer* v. *Russel*, 4 Or. 124; *Lee* v. *Giles*, 1 Bailey 449; 21 Am. Dec. 476; 3 Bl. Com. (Wendell's ed.) 160.

Counsel say in their brief: "There are *dicta* in several decisions which would seem to take a contrary view; but we have been unable to find a case where the question was squarely raised, and the decision was that such an action could be maintained at common law until the judgment became dormant, or the execution would prove ineffectual. * * * *Burnes* v. *Simpson*, 9 Kans. 658, decides that an action can be maintained on a domestic judg-

ment in this state, which is true; but whether it can be maintained when an execution can issue thereon was not raised in that case, and consequently not examined. We claim that case does not decide the question now raised."

The decision in *Burns* v. *Simpson*, *supra*, goes further than counsel are willing to concede. In that case the judgment was rendered June 4th 1859, for $3054 and costs. Executions were issued as follows: September 28th 1859; November 28th 1859; January 27th 1860; August 15th 1864; May 2d 1869. All of these were returned unsatisfied. The action on the judgment was commenced June 2d 1869. Under the law in force at the rendition of the judgment of June 4th 1859, judgments of the District Court were liens for five years on lands, and as long thereafter as judgment should be kept alive by the issue of executions in proper time: Comp. Laws 1862, sects. 433, 434. The judgment of *Burns* v. *Simpson*, of June 4th 1859, was in full force and unsatisfied when the action of June 2d 1869 was instituted, as it had been kept alive by the issue of executions in accordance with the provisions of the statute. Therefore the decision in *Burns* v. *Simpson*, upon the record in that case, decides, in effect, that an action can be maintained upon a judgment in this state, although the judgment is in full force, and the time within which an execution can be issued has not expired. As counsel have been unable "to find a case where the question was squarely raised, and it was decided that such an action could be maintained at common law until the judgment became dormant, or the execution would prove ineffectual," we refer to the following authorities: "Debt lies upon a judgment within or after the year after the recovery:" Wh. Selw. 444. "By common law, an action could be maintained within a year and a day on a domestic judgment, that being the life of a judgment without issuance of execution:" 1 Com. Dig. 1792, "*Debt*," A 2 (43d ed.), 3, 2, B.

In *Ames* v. *Hoy*, 12 Cal. 11, it was insisted by counsel "that, as an execution could have been issued on the judgment no action could be sustained thereon; or, in other words, that an action of debt will not lie on a judgment if an execution can be issued thereon." Upon this point, the court, BALDWIN, J., delivering the opinion, said: "The chief argument is that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained; and no better

or higher right or advantage is given to the subsequent judgment. But this is not true in fact, as in many cases it may be of advantage to obtain another judgment, in order to save or prolong the lien, and in this case the advantage of having record evidence of the judgment is sufficiently perceptible. The argument that the defendant may be vexed by repeated judgments on the same cause of action is answered by the suggestion that an effectual remedy to the party against this annoyance is the payment of the debt."

In *Greathouse* v. *Smith*, 4 Ill. (3 Scam.) 541, TREAT, J., delivering the opinion of the court, said: "No rule of law is better settled than the one that an action of debt is maintainable on a judgment of a court of record. The judgment is a good cause of action, it being, as between the parties, the most conclusive evidence of indebtedness. We know of no principle which inhibits the creditor, on a judgment, which is in force and unsatisfied, from recovering in an action brought on it, although he may, at the time of bringing the suit, be entitled to an execution on his judgment. He is at liberty to proceed by execution to collect the judgment or institute a new action on it. Notwithstanding the second suit may be unnecessary, he has the clear legal right to recover, and the courts have no power to prevent him, or impose terms on him for so doing."

In that case, Abraham Lincoln, afterwards president, appeared as one of the counsel.

In *Davidson* v. *Nebaker*, 21 Ind. 334, it was decided that "a judgment is a debt of record, and an action will lie to recover it, whether the judgment is foreign or domestic, notwithstanding the plaintiff may have a remedy on the judgment, in the court where it was rendered, by execution or otherwise."

In *Hale* v. *Angel*, 20 Johns. 342, it was held: "Where an execution, issued on a judgment in justice's court, is not returned at all by the constable, the common-law right of the party remains unimpaired, and he may bring an action of debt on the judgment." In the opinion it was said: "There are no negative words that a party shall not sue on a judgment until the execution has been returned. The common-law right of bringing an action of debt *as soon as a judgment is recovered*, remains unimpaired. The statute does not give the action of debt, but is merely explanatory of the common-law right."

In *Smith* v. *Mumford*, 9 Cow. 26, the case of *Hale* v. *Angel*, *supra*, was referred to and followed.

In *Linton* v. *Hurley*, 114 Mass. 76, it was held: "An action may be maintained upon a judgment, although an execution issued thereupon has not been returned;" and in *O'Neal* v. *Kittredge*, 85 Mass. (3 Allen) 470, it was decided "that a declaration setting forth the recovery by the plaintiff against the defendant, of a judgment for a certain sum as damages, and another certain sum as costs, which judgment remains in full force and unsatisfied, whereby an action hath accrued to the plaintiff to have and recover of the defendant the balance due thereon, and interest, is sufficient on demurrer."

Freeman, in his work on Judgments (3d ed.), sect. 432, says: "At common law a party has a right of action upon his judgment as soon as it is recovered. This right is neither barred nor suspended by the issuing of an execution, nor because, from having the right to take out execution, the plaintiff's action seems to be unnecessary."

Many other cases might be cited supporting the same doctrine, but we think, for present purposes, the above sufficient. If the question were a new one in this state, the writer of this would prefer to follow *Lee* v. *Giles*, 1 Bailey 449, and *Pitzer* v. *Russel*, 4 Or. 124; but the case of *Burns* v. *Simpson* is decisive. That decision was rendered in 1872, and it is for the legislature to interpose and provide that such oppressive and vexatious actions shall not be brought if the rule of the common law, as interpreted in *Burns* v. *Simpson*, *supra*, is to be changed.

Finally, it is urged that the judgment rendered was improper: 1st, because the state had certain rights which the court was bound to consider; and 2d, because the language of the petition did not warrant the judgment. The petition alleged that the only claim the state had upon the property was to secure the payment of $676.80, with interest, and that there was no controversy between the state and Matilda W. Hummer as to the lien of the state. The judgment in no way affected the state, and any person desiring to bid at the sale of the real estate can readily ascertain the state's interest therein. The purchaser at the sale must buy subject to the lien of the state.

In regard to the other matter, it appears that an attachment had been issued, and, after the rendition of the judgment, an order for

the sale of the attached property was properly made: Code, sect. 222. If, however, there was any variance between the prayer of the petition and the judgment rendered, the petition could have been amended, and the judgment will not be reversed on account of such variance: *Railroad Co.* v. *Caldwell*, 8 Kans. 244; *Mitchell* v. *Milhoan*, 11 Id. 630.

The ruling and judgment of the District Court will be affirmed. All the justices concurring.

Debt lies on a judgment generally: 1 Chit. Pl. 121; 1 Tidd's Pr. 3; 3 Black. Com. 129; 1 Selw. N. P. 616; 3 Comyns's Dig. "*Debt*," a. 2; *Bank of Columbia* v. *Newcomb*, 6 Johns. 98; *Taylor* v. *Twiss*, 16 Id. 66; *Andrews* v. *Montgomery*, 19 Id. 162; *Townsend* v. *Carman*, 6 Cowen 695; *Haven* v. *Baldwin*, 5 Iowa 503; *Proctor* v. *Johnson*, 1 Ld. Raym. 670; *Anon.*, Salk. 209, pl. 3; *Millard* v. *Whittaker*, 5 Hill 408; *Jackson* v. *Shaffer*, 11 Johns. 513. So even though part of the judgment may have been collected: 2 Tidd's Pr. 1028; *Hessee* v. *Stevens*, 2 Smith's Rep. 39 S. C. The rule is the same whether the judgment be of a superior or inferior court: *Stuart* v. *Lander*, 16 Cal. 372; 1 Chit. Pl. 111; *Denison* v. *Williams*, 4 Conn. 402; *Cole* v. *Driskill*, 1 Blackf. 16; *Gardner* v. *Henry*, 5 Cold. 458. But in an action upon the judgment of an inferior court, the declaration must show the original cause of action to have been within such court's jurisdiction: 1 Selw. N. P. 616; *Read* v. *Pope*, 1 Cr., M. & R. 302; 1 Chit. Pl. 371; *Sheldon* v. *Hopkins*, 7 Wend. 435; *Spooner* v. *Warner*, 2 Bradw. 240; 4 Tyr. 403. Debt lies whether the judgment be of a domestic or foreign court; a judgment of a foreign court being *prima facie* evidence of indebtedness only; but the merits of a domestic judgment or that of a sister state where the court had jurisdiction of person and subject-matter cannot be gone into in an action founded on the judgment, and *nil debet* is not a good plea: Freeman on Judg., § 435; *Mills* v. *Duryee*, 7 Cranch 481; *Andrews* v. *Montgomery*, 19 Johns. 162; *Hitchcock* v. *Fitch*, 1 Cai. 461; *Taylor* v. *Bryden*, 8 Johns. 173; *Bimeler* v. *Dawson*, 4 Scam. 536; *Hubbell* v. *Coudrey*, 5 Johns. 132; *Nations* v. *Johnson*, 24 How. (U. S.) 203; *Geeen* v. *Orrington*, 16 Johns. 55; *Wright* v. *Mott*, Kirby 152; *Bush* v. *Byvanks*, 2 Root 248; *Biddle* v. *Wilkins*, 1 Peters (U. S.) 686; *Cardesa* v. *Humes*, 5 S. & R. 65; *Hayward* v. *Ribbans*, 4 East 311; *Moore* v. *Bowmaker*, 2 Marsh. 392. In such a case the proper remedy is to have the judgment set aside or reversed by a direct proceeding for that purpose: *Horfy* v. *Daniel*, 2 Levering 161; 1 Chit. Pl. 370. But the record may be disproved to show that the court had not jurisdiction of the person of the defendant: *Knowles* v. *Logansport G. L. & C. Co.*, 19 Wall. 58; *Starbuck* v. *Murray*, 21 Am. Dec. 172. Debt also lies on a judgment recovered in a *qui tam* action in another state: *Heal* v. *Root*, 11 Pick. 389; *Spencer* v. *Brockway*, 1 Ohio 124. So, debt lies upon a *money* decree of a court of chancery of a sister state: *Warren* v. *McCarthy*, 25 Ill. 95; 1 Chit. Pl. 111; *Post* v. *Neafie*, 3 Caines Rep. 22; *McKim* v. *Odom*, 3 Fairf. 94; *Elliott* v. *Ray*, 2 Blackf. 31; *Evans* v. *Tatem*, 9 S. & R. 252; *Tilford* v. *Oakley*, Hemp. 197. But not in Great Britain upon the decree of a domestic court, because such court has the necessary means of enforcing its own orders: 1 Chit. Pl. 111; *Henly* v. *Sopor*, 8 Barn. & Cress. 16, and *Carpenter* v.

Thornton, 3 B. & Ald. 52. And this rule is followed in *Richardson* v. *Jones*, 3 Gill & J. (Md.) 163. But *contra*: *Howard* v. *Howard*, 15 Mass. 196; *Pennington* v. *Gibson*, 16 How.(U. S.) 65; *Nations* v. *Johnston*, 24 Id. 203. And the general rule in this country seems to be that where debt will lie upon a judgment of a court of law, it will lie also upon a chancery decree under like conditions.

In debt on judgment the recovery of a second judgment does not merge the former: *Andrews* v. *Smith*, 9 Wend. 54; *Doty* v. *Russell*, 5 Id. 129; *Jackson* v. *Shaffer*, 11 Johns. 517.

The decision in the principal case, that debt will lie on a judgment within the time in which execution may issue, is supported by the great weight of authority: *Greathouse* v *Smith*, 3 Scam. 54; 6 Wheeler's Com. Law 268; *Hale* v. *Angel*, 20 Johns. 342; *Smith* v. *Mumford*, 9 Cow. 26; *Church* v. *Cole*, 1 Hill 645; *Denison* v. *Williams*, 4 Conn. 102; Com. Dig. "*Debt*" A 2; *Thomson* v. *Lee*, 22 Iowa 206; *Clark* v. *Goodwin*, 14 Mass. 237; *Davidson* v. *Nebaker*, 21 Ind. 334; *Ives* v. *Finch*, 28 Com. 112; *Albin* v. *People*, 46 Ill. 372; *Stewart* v. *Peterson*, 63 Penn. St. 230. The reason for this rule is usually stated to be that interest cannot be collected on a judgment at common law without such second action: *Clark* v. *Goodwin*, 14 Mass. 237; *Hesse* v. *Stevenson*, 2 Smith 39, 42; *Stewart* v. *Peterson*, 63 Penn. St. 230.

The rule is the same whether execution has been returned or not. *Hale* v. *Angel*, 20 Johns. 343; *White River Bank* v. *Downere*, 29 Verm. 332. So with or without averring any special facts as a reason for bringing it: *Denison* v. *Williams*, 4 Conn. 402; *Ives* v. *Finch*, 28 Id. 112.

Notwithstanding the rule appears to be thus settled upon authority, it would seem more in accordance with one's sense of justice that, where nothing is to be gained by the new action other than the coercion that may result from the mere piling up of costs, the common law should be amended by statute and the second action be denied, and this more equitable view, without the aid of legislation, has been adopted in *Pitzer* v. *Russel*, 4 Oreg. 124; *Lee* v. *Giles*, 1 Bail. (S. C.) 449. See, however, *Shooter* v. *McDuffie*, 5 Rich. Law 61, 66, where it was held that the common-law rule related only to fresh suit by common-law process, and not to a suit by foreign attachment.

In *Lee* v. *Giles*, *supra*, ALCOCK, J., says: "I can never sanction the idea that a new action should be permitted by way of punishing a debtor for not paying his debt. There is something barbarous in it, and wholly inconsistent with the mild, benignant and just spirit of the common law. As long as the judgment is operative, the creditor has the means of enforcing payment; and if the debtor can pay, an execution is as effectual as another suit, and more expeditious."

In *Pitzer* v. *Russel*, *supra*, the question was very fully discussed and the conclusion reached "that neither the common law nor the practice in the various states of the republic, nor anything inherent in the subject, based on sound reason, gives to a judgment-creditor an absolute right of action on a domestic judgment, unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment.

The question seems generally to depend on whether an action on a judgment could be brought within a year and a day, at common law, that being the time during which execution might issue. Several of the cases cited above take the ground that such action might be so brought, and refer generally to 2 Bac. Abr. *Debt*, A; Comyns's Dig. *Debt*, A 2, and Wheat. Selw. 445 (616, 7th Am. ed.); but these authorities cite 43 Edw. 3, 2 B., which is said, in *Lee* v. *Giles*, 1 Bailey 449, to be an authority that the

action would not lie within the time mentioned; and 2 D'Anv. Abr. 500, *Debt*, C, and 7 Vin. Abr. 352, *Debt*, N, are cited as approving of this view of the case.

In *Stewart* v. *Peterson*, 63 Penn. St. 230, SHARSWOOD, J., renders the decision in 43 Edw. 3, thus: "If one recover upon a statute merchant, the statute gives an execution by *capias*, and also against the land, notwithstanding he can have a writ of debt," and supports the former view of that case. See, also, *Clark* v. *Godwin*, 14 Mass. 237, 239.

In Alabama the courts seem to doubt whether the action would lie within a year and a day, but refuse to follow the principle further, and permit an action to be brought after such time, but within ten years, the time in which execution may issue: *Kingsland* v. *Forrest*, 18 Ala. 519; *Elliott* v. *Holbrook*, 33 Id. 659.

The view taken by SHARSWOOD, J., in *Stewart* v. *Peterson*, of the decision in 43 Edw. 3, seems to be the correct one; and, if such is the case, the weight of modern authority, as above stated, is founded upon a proper view of the common-law rule, and if a change is desirable, it should be made by the legisture, and not by the courts.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Rhode Island.

SINGER MANUFACTURING CO. *v.* KING.

A refusal to deliver an article of personal property to the one entitled to it on demand, is *prima facie* evidence of a conversion.

It is no conversion in a bailee, who has received an article in good faith from a third person, to refuse to deliver it to the owner making the demand until he has had an opportunity to satisfy himself in regard to the ownership.

A servant receiving a chattel from his master ought not to give it up without consulting his master with regard to it; but, if after such consultation he relies on his master's title, and refuses to comply with the owner's demand, he is guilty of a conversion.

The defendant, by order of his principal, the American Sewing Machine Co., received through a fellow-servant, held a machine of the plaintiff on a claim of storage, which was ill-founded but in good faith, and refused to deliver it up. He had no personal interest in the matter. *Held*, that the defendant was liable.

EXCEPTIONS to the Court of Common Pleas.

Ziba O. Slocum, for the plaintiff.

Albert D. Bean, for the defendant.

The opinion of the court was delivered by

DURFEE, C. J.—This is trover for the conversion of a sewing machine belonging to the plaintiff company. The case was tried in the Court of Common Pleas and comes here on exceptions. The